

**TCEQ DOCKET NO. 2005-1490-WR  
SOAH DOCKET NO. 582-10-4184**

APPLICATION BY THE BRAZOS	§	BEFORE THE STATE OFFICE
	§	
RIVER AUTHORITY FOR WATER	§	OF
	§	
USE PERMIT NO. 5851	§	ADMINISTRATIVE HEARINGS
	§	

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**CITY OF BRYAN AND CITY OF COLLEGE STATION'S EXCEPTIONS TO  
PROPOSAL FOR DECISION**

The City of Bryan and the City of College Station (the Cities) submit these exceptions to the Proposal for Decision (PFD) and in support thereof show the following:

**I. Return Flows**

**A. The PFD misstates the scope of BRA's permit application following its amendment as required by BRA's settlement agreement with the Cities.**

The Administrative Law Judge's (ALJ's) analysis of the return flow issues begins by noting that these issues raised by BRA's application are "extremely complex" and involve a great deal of ambiguity about confusing legal and regulatory issues.<sup>1</sup> The desire for certainty in the face of this complexity and ambiguity was a significant factor that led the Cities to negotiate settlement agreements with BRA concerning the Cities' groundwater based return flows. Pursuant to those settlement agreements BRA amended its permit application on December 22, 2009 to clarify that it is "*not applying to appropriate or divert* any return flows that are subject to a bed and banks authorization granted now or hereafter by TCEQ pursuant to Texas Water Code §11.042(b)."<sup>2</sup>

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<sup>1</sup> PFD at 147.

<sup>2</sup> BRA EX 7-M.

Although the PFD notes that BRA amended its application as required by the settlement agreements<sup>3</sup> it thereafter describes BRA's application based on its posture before, not after, the amendment required by the settlement agreements. The PFD states that BRA's application treats *return flows from any source, including groundwater*, as "state water" available for appropriation.<sup>4</sup> The PFD also notes that BRA requested appropriation of current and future return flows "*from all sources*" once they are discharged into a watercourse.<sup>5</sup>

BRA's amendment of its application pursuant to its settlement agreement with the Cities fundamentally altered its appropriation request as it relates to groundwater based return flows. BRA's amendment disavows any request to appropriate or divert groundwater based return flows that are subject to a bed and banks authorization granted by TCEQ now or in the future. When BRA filed pre-filed testimony that appeared to conflict with its application amendment made pursuant to the settlement agreement, the Cities again sought to bring clarity and certainty to this issue. The Cities sought and obtained a stipulation from BRA on the record at the prehearing conference in this matter. BRA's stipulation provided:

"BRA does not seek to appropriate, divert, or use the Bryan and College Station return flows, and to the extent that Mr. Gooch testified that BRA could use it until it was needed, once it was permitted in a bed and banks permit it was needed."<sup>6</sup>

The PFD suggests that the Commission might consider granting the Application in part and only authorize diversions at Glen Rose, Highbank, Richmond, or the Gulf and solely for the quantities identified in the Application for those locations, less certain reductions discussed in the PFD.<sup>7</sup> In order to avoid resurrecting ambiguity concerning BRA's ability to appropriate, through its system operation permit application, the groundwater based return flows of the Cities, the Cities respectfully request that the option provided to the Commission through the PFD concerning granting BRA's application in part be modified to include:

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<sup>3</sup> PFD at 11.

<sup>4</sup> PFD at 137.

<sup>5</sup> *id.*

<sup>6</sup> Prehearing conference, 5/3/2011 at 83/4-84/8

<sup>7</sup> PFD at 4.

1. The permit recitations that describe BRA's application should expressly reference BRA's December 22, 2009 amendment of its application to clarify that it is not applying to appropriate or divert any return flows that are subject to a bed and banks application granted now or hereafter by TCEQ pursuant to Texas Water Code §11.042(b).
2. BRA's proposed special condition 5.A.(3), if considered for inclusion to the permit, should be modified to read: "Permittee's storage, diversion, and use of groundwater based return flows is subject to interruption by direct or indirect reuse. Upon issuance of a bed and banks authorization pursuant to Texas Water Code §11.042(b) by TCEQ to the discharging entity, permittee's authorization to store, divert and use those groundwater based return flows terminates."

**B. BRA's WAM model used to determine water available for appropriation improperly includes the Cities' groundwater based return flows that BRA does not seek to appropriate.**

BRA's modeling used to develop its estimate of water available for appropriation under the system operation permit at the hypothetical control points includes groundwater based return flows of the Cities.<sup>8</sup> BRA's inclusion of the Cities' groundwater based return flows in its request for an appropriation under the system operation permit conflicts with BRA's amendment of its permit application pursuant to its settlement agreement with the Cities and BRA's stipulation at the prehearing conference. Accordingly, the PFD should note that if the commission elects to consider granting BRA's application in part and authorizing diversions at the hypothetical control points, this matter should be remanded to SOAH for BRA to submit evidence on the quantity of water available under the system operation permit without the Cities' groundwater based return flows or other groundwater based return flows authorized by Texas Water Code §11.042(b).

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<sup>8</sup> BRA EX 7A4 at D-4; BRA EX 15 at 16, 46-47; PFD at 151-152.

Wherefore, the Cities request that the PFD be modified as requested through these exceptions.

Respectfully submitted,

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By:

  
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**ATTORNEYS FOR THE CITY OF BRYAN  
AND THE CITY OF COLLEGE STATION**

## **CERTIFICATE OF SERVICE**

I hereby certify that on this the 7<sup>th</sup> day of November 2011, a true and correct copy of the foregoing document was served by email and electronic filing with a follow-up by U.S. Mail:

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